STATE OF NEW YORK

COURT OF APPEALS

BEFORE: HON. CARMEN BEAUCHAMP CIPARICK

Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

JUAN SUROS,

Appellant.

CERTIFICATE DENYING LEAVE

I, CARMEN BEAUCHAMP CIPARICK, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon the application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,*

there is no question of law presented which ought to be reviewed by the Court of Appeals and permission is hereby denied.

Dated at New York, New York

April 4, 1995

CARMEN BEAUCHAMP CIPARICK

Associate Judge

* Description of Order: Order of the Appellate Division, First Department, entered November 3, 1994, modifying a judgment of the Supreme Court, New York county, rendered July 13, 1993.

Ellerin, J.P., Rubin, Nardelli, Williams, JJ.

52999

The People of the State of New York,

Respondent,

-against-

Juan Suros,

Defendant.

Judgment, Supreme Court, New York County (Richard Lowe III J.), rendered July 13, 1993, resentencing defendant to time served, 5 years probation, 1000 hours of community service, $5,000 fine and payment of $196,494.92 as restitution, upon his plea of guilty, of grand larceny in the third degree; and order, same court, entered on or about April 1993, denying, in part, defendant's motion to

vacate the restitution and fine imposed, unanimously modified, on the law and the facts, to the extent of vacating the imposition of community service and remanding the matter to Supreme Court for resentencing and otherwise affirmed.

Defendant's complaint regarding the manner in which the amount of restitution was determined has not been preserved for review (People v. Callahan, 80 NY2d 273, 281), and we decline to reach it in the interest of justice. In any event, we would find that since both defendant and his counsel consented to the restitution ordered, the court did not err in refusing to conduct a hearing pursuant to Penal Law §60.27(2), or in relying upon figures recited n two letters from the victim (People v. Lugo, 191 AD2d 648).

Defendant's extensive experience in numismatics, and his position as a generous benefactor of his victim, provided him with an unparalleled understanding of the "tangible and intangible" damages which resulted from his theft of numerous coins from his victim.

As the People concede, defendant was improperly sentenced to community service. Since defendant's consent could not be inferred from earlier plea negotiations, and the court's authority was limited to resentencing him only with respect to the fine which it had imposed (People v. Yannicelli, 40 NY2d 598, 602), the matter is remanded to the Supreme Court for resentencing.

APP.6

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 3, 1994

CATHERINE O'HAGAN WOLFE
CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 64

THE PEOPLE OF THE STATE OF NEW YORK, :

-against- :

JUAN SUROS, :

Defendant. :

DECISION AND ORDER IND. NO. 7976/89

RICHARD B. LOWE III, J.:

On November 27, 1990, the defendant pled guilty to grand larceny in the third degree (Penal Law §155.35). The defendant has moved pursuant to CPL 44.20 to set aside the sentence on the ground that portions of the sentence imposed were invalid or illegal.

FACTUAL BACKGROUND

On April 15, 1989, the defendant was arrested and charged in a felony complaint

with grand larceny in the second degree (Penal Law §155.40[1]). It was alleged that the defendant, a California heart surgeon and avid coin collector, stole approximately 83 coins, with a total appraised value in excess of $1,000,000, from the American Numismatic Society (hereinafter "ANS"). The defendant was subsequently indicted for grand larceny in the first degree (Penal Law §155.452) and criminal possession of stolen property in the first degree (Penal Law §165.52).

After extensive plea negotiations and the preparation of a prepleading investigation report, the parties arrived at a disposition. the defendant pled guilty to grand larceny in the third degree. The defendant was sentenced to a period of incarceration of six months and

the remainder of five years on probation. The defendant's prison sentence was to be served in a California jail and his probation supervised by the California Department of Probation. In addition, the defendant was to pay a total of $1,036,494.92. Of that sum, $36,494.92 was to be paid to the ANS for out-of-pocket expenses incurred in connection with the investigation and prosecution of this matter. An additional $160,000 was to be paid to the ANS for the installation of a security system and for other damages incurred as a result of the defendant's conduct. The remainder, $840,000, was to be paid to the City of new York through the Department of probation in a payment schedule set forth at the sentencing.

The defendant has completed his six-

month sentence of incarceration and has paid to the ANS the full amount imposed at sentence - $196,494.92. The defendant has also paid to the City of New York $40,000, the initial installment of $840,000 payment.

On December 23, 1992, several days prior to the date the defendant was required to pay $200,00 as the second installment of the $840,000 payment to the City, the defendant filed the instant motion claiming that portions of his sentence were illegal.

The defense asserts that the $840,000 payment to the City, which the defense characterizes as a fine, was illegal since the maximum fine for a felony is either $5000 or twice the amount of defendant's "gain" as that term is defined in Penal

Law §80.00(2). It is the defendant's position that since "gain" is defined as the value of the property stolen less the value of that which was recovered, there was no "gain" in this case at all since all of the stolen coins were recovered and returned to the ANS. The defendant seeks an order remitting the fine imposed upon the defendant to the extent that it exceeds $5000.

The defendant additionally contends that the payment of $196,494.92 to the ANS was improperly imposed because the court failed to hold a hearing pursuant to CPL 400.30 and Penal Law §60.27(2) to determine the appropriate amount of restitution and reparation.

Finally, the defense maintains that should the court grant the defendant's

motion to set aside the sentence, the court is prohibited under CPL 430.10 from resentencing the defendant to any additional incarceration.

$840,000 Payment

Penal law §80.00(1) provides that the maximum fine a defendant convicted of a felony (not involving narcotics) may be sentenced to is either $5,000 or twice the amount of the defendant's gain from the commission of the crime. The People concede that in this case the defendant did not realize any gain as a result of his theft of the coins since those coins were ultimately recovered and returned to the ANS. The People also concede that in this case the defendant could not have lawfully been sentenced to a fine of

$840,000.

The People maintain, however, that the sentence of the $840,000 payment was lawful. The People assert that both the defense and the court at the defendant's sentencing proceeding mischaracterized this payment as a fine. The People contend that the court merely misspoke at the defendant's sentencing when referring to the total $1,000,000 payment as a fine and has the inherent power to correct its own error. It is the People's position that the court was authorized to sentence the defendant to this payment, not as a fine, but rather as a condition of his rehabilitation.

After a careful review of the relevant statutes and case law, the court finds that the $840,000 payment, whether

termed a fine or other condition of probation, was unauthorized by law. All parties are in agreement that the order directing the defendant to pay $840,000 to the City exceeded the scope of §80.00 of the Penal Law and therefore this payment cannot be considered a lawfully imposed fine. Moreover, the courts have consistently held that a defendant may not be sentenced to a monetary payment unless such payment constitutes a fine, restitution or reparation. For example, in People v. Appel, 141 AD2d 374 (1st Dept. 1986), the court held that a sentence ordering the defendant to make a $1,000 donation to a shelter for battered women was unauthorized by law as the shelter was not itself the victim of the defendant's assaultive behavior and the

mandated payment could not be upheld as either a fine, restitution or reparation. Similar results were reached by the courts in People v. White, 119 AD2d 708 (2d Dept. 1986) (sentence directing the defendant to pay the sum of $5,000 to the Widows and Orphans Fund of the Patrolmen's Benevolent Association as a condition of probation was not authorized under Penal law §65.10); People v. Rowe, 152 AD2d 907 (4th Dept. 1989), aff'd 75 NY2d 948 (1990) (defendant was improperly sentenced to make restitution to the Rochester Police Department for unrecovered drug "buy" money expended by the police in effecting the defendant's arrest); People v. Palmeri, ___AD2d___, (4th Dept. 1992), 588 NYS2d 227 (no statutory authority for sentence directing the defendant to repay

the fees of assigned counsel as a condition of probation); People v. Dulanski, 175 AD2d 672 (4th Dept. 1991) (court did not have the authority to sentence the defendant to reimburse a public law enforcement agency for expenses incurred in extraditing the defendant from California); People v. Purcell, 161 AD2d 812 (2d Dept. 1990) (sentence directing the defendant to pay $3150 to Orange County for costs incurred in the investigation and prosecution of his case was unauthorized by statute and vacated).

In sum, the court has found no authority to justify the imposition of the $840,000 payment as a condition of the defendant's probation nor has any such authority been furnished to the court by the prosecution. The court is therefore

constrained to grant the defendant's motion to set aside that portion of the defendant's sentence directing him to pay the City of New York $840,000.

$196,494.92 Payment to the ANS

Penal Law §60.27(2) as it existed at the time of the sentence in this case provided:

> Whenever the court requires restitution or reparation to be made, the court must make a finding as to the fruits of the offense or the loss or damage caused by the offense. If the record does not contain sufficient evidence to support such finding, or upon request by the defendant,, the court must conduct a hearing upon the issue in accordance with the procedure set forth in section 400.30 of the criminal procedure law.

In this case the defendant did not request that a hearing be held to determine the amount of restitution to be

paid to the ANS and no such hearing was held. It is true, as the defense contends, that the failure of defense counsel to request a hearing on the amount of restitution does not obviate the need for the sentencing court to conduct a hearing and does not operate as a waiver of a defendant's right to such a hearing. See People v. Andrea, 141 AD2d 740, 743 (2d Dept. 1988). However, it is also well established that where a defendant expressly concedes the amount of restitution due and agrees to pay it, a hearing is unnecessary. People v. Moore, 176 AD2d 968 (2d Dept. 1991); People v. Kade, 153 AD2d 908 (2d dept. 1989); People v. Kelsky, 144 AD2d 386 (2d Dept. 1988).

The court finds sufficient support in the minutes of the defendant's sentencing

proceeding to conclude that the defendant expressly consented to the amount of restitution owing to the ANS.

At page 5 of the sentencing minutes, defense counsel states:

> Subject to the authority of this Court and the consent the consent of the defendant, defendant agrees that such amount as indicated by the Court will be payable to the American Numismatic Society on account of its loss. This amount will be stipulated by and between the People and the defendant.

Additionally, reference is made throughout the sentencing minutes that the payments of $36,494.92 and $160,000 to the ANS were to cover out-of-pocket expenses and other damages incurred by the ANS as a result of the defendant's criminal conduct (see sentencing minutes at p. 6, 15-19). The court finds that by his pleading

guilty, the defendant knowingly and voluntarily consented to pay the ANS restitution for damages in the much-negotiated and agreed upon amount of $196,494.92.

In support of his position that a hearing was necessary in this case, the defendant cites people v. Fuller, 57 NY2d 152 (1982), People v. Andrea, supra, People v. Barnes, 135 AD2d 825 (2d Dept. 1987) and People v. Sommer, 195 AD2d 1052 (4th Dept. 1984). In each of these cases, the court remanded the matter for a hearing to determine the proper amount of restitution. The court finds none of these cases are controlling under the circumstances present in this case. People v. Fuller, supra, involved a sentence where the amount of restitution

was determined by the Department of Probation. Additionally, Andrea, Barnes, and Sommer all involved cases where the defendant did not consent to and agree to pay the amount of restitution imposed.

Resentence

Penal Law §440.20(1) provides that "[a]t any time after the entry of judgment, the court in which the judgment was entered may, upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law." Penal Law §440.20(4) further provides that "[a]n order setting aside a sentence pursuant to this section does not affect the validity or status of the underlying conviction, and after entering such an order the court must resentence

the defendant in accordance with the law."

It is the People's position that should the court find the sentence of the $840,000 payment invalid pursuant to CPL 440.20(4), the defendant may be resentenced up to the maximum sentence allowed by law for the crime to which the defendant pled guilty. The People maintain that in this case resentence could include a period of incarceration of 2 1/3 - 7 years.

The defendant asserts that pursuant to CPL 430.10, the court may not resentence the defendant to any additional incarceration. In support of this position, the defense cites People v. Yannicelli, 40 NY2d 598 (1976) and People v. Demanso, 145 AD2d 907 (4th Dept. 1988).

CPL 430.10 provides that "[e]xcept as

otherwise specifically authorized by law, when the court has imposed a sentence of imprisonment and such sentence is in accordance with law, such sentence may not be changed, suspended or interrupted once the term or period of the sentence has commenced."

In People v. Yannicelli, supra, each of the two defendants pled guilty to possession of gambling records in the first degree. One was sentenced to a term of imprisonment of three month and a fine of $1,000 and the other was sentenced to a term of two months and a $250 fine. On a prior appeal, the Appellate Division reversed and remanded for resentencing holding that the sentences were invalid as a matter of law because the sentencing court failed to comply with the

requirement of Penal Law §80.00 that where a fine for a felony is imposed, the court must make a finding as to the amount of the defendant's gain from the crime. On resentence, the court did not impose any fines, but resentenced the defendants, who had already served their original terms of imprisonment, to longer terms which would run concurrently and the defendants would receive credit for time served. The defendants then appealed their resentence.

The Court of Appeals in Yannicelli held that the resentence of the defendants to a longer period of incarceration was prohibited by CPL 430.10. the Court noted that since the original term of imprisonment was lawful and had been completely served prior to resentence, the court had no power to alter it by

sentencing them to a different, longer term. The Court held that resentence should be solely limited to correct the procedural defect made with respect to the imposition of the fine.

In People v. Demanso, supra, the defendant pled guilty to grand larceny in the second degree and was sentenced to a term of probation, restitution and a fine. The defendant moved to set aside his sentence pursuant to CPL 440.20 insofar as the court imposed a fine without first complying with the procedural requirements of Penal Law §80.00. The court granted the defendant's motion and vacated the sentence. Upon resentencing, the court ordered restitution and imposed a term of imprisonment.

The court in Demanso held that the

sentencing court erred in imposing a term of imprisonment upon resentencing. Citing Yannicelli, the court held that upon resentencing the court was required to reimpose the parts of the original sentence that were proper and to correct only the part of the sentence that was invalid, i.e., the imposition of the fine without first complying with Penal Law §80.00.

The court finds the instant matter to be factually and legally indistinguishable from Yannicelli and Demanso. As the defendant's original sentence of six-month imprisonment was lawful and has been completely served by the defendant, the court is prohibited under CPL 430.10 from imposing any additional incarceration.

In arguing that additional

incarceration may be imposed, the People rely on Kisloff ex. rel. Wilson v. Covington, 73 NY2d 445 (1989).

In Kisloff, the defendant, a predicate felony offender, pled guilty and was sentenced to felony time for the crime of attempted grand larceny in the third degree, which all parties mistakenly believed was a class E felony rather than a class A misdemeanor. The error was discovered and the defendant was returned before the plea judge who, in an effort to effectuate what had been the intent of the parties, proposed that the defendant plead guilty to grand larceny in the fourth degree, an E felony, which would support the sentence agreed to and previously imposed. When the defendant rejected the proposal and insisted upon being sentenced

in accordance with his misdemeanor plea, the court vacated the plea and set the matter down for trial on the indictment. Thereafter, the defendant commenced an article 78 proceeding seeking to prohibit further prosecution on the felony charges, to have his original plea reinstated and to be resentenced as a misdemeanor offender. The Court of Appeals held that the trial court lacked the inherent power to vacate the plea and sentence over the defendant's objection where the error was more than a mere clerical error on the face of the record and where the proceeding had been terminated by the entry of judgment. The Court held that vacating the misdemeanor plea and requiring the defendant to face the original felony charges contained in the

indictment would be barred by the defendant's constitutional right not to be twice put in jeopardy. The Court then remanded the matter for resentencing the defendant as a misdemeanor offender.

The court finds the People's reliance on Kisloff to be misplaced. In Kisloff, the Court of Appeals simply held that once a sentence is imposed following a guilty plea, the underlying plea could not be disturbed even if the sentence was illegal. In Kisloff, although the parties mistakenly agreed to a disposition where the defendant pled guilty to a class A misdemeanor, the defendant was entitled to be sentence in accordance with that plea. Pursuant to Kisloff, once sentence is imposed upon a defendant, a court may not impose a lengthier sentence unless the

original mistaken sentence resulted form a mere clerical error. Thus, the court finds that the reasoning of Kisloff does not support the People's position that in this case the defendant may be sentenced to additional incarceration.

Summary

The defendant's motion to set aside that portion of his sentence directing him to make a payment of $840,000 to the City of New York through the Department of probation is granted.

The defendant's motion to set aside that portion of his sentence directing the payment of restitution to the ANS in the amount of $196,494.92 or ordering a hearing on the issue of restitution is denied.

The defendant will be resentenced in accordance with CPL 440.20(4). Pursuant to CPL 430.10, additional incarceration will not be imposed.

At resentence, the court will direct the remission of any excess monies paid by the defendant pursuant to CPL 420.30.

This opinion constitutes the decision and order of the court.

Dated: April 8, 1993
New York, New York

RICHARD B. LOWE, III
J.S.C.